Supreme Court, U. S.
FILED
APR 19 1975
MICHAEL RODAK, JR., CLERK

No. 73-1689

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Appellee, ignoring the legislative history of the 1914 Clayton Act, cites no authority for its contention that Congress intended to limit the application of the Clayton Act to firms whose activities are in the flow of commerce while exercising to the full extent its constitutional power to regulate commerce in enacting the Sherman Act (Appellee's brief pp. 18–25.). It is unnecessary to speculate, as appellee does (*ibid.*), concerning the possible motives of Congress in passing the Clayton Act.[1] For, as pointed out in our main

[1] Appellee's suggestion (Br. p. 19) that the facts that the Sherman Act contains criminal penalties and that its application is often based on a *per se* doctrine are somehow related to

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brief (pp. 14–17, 19–20), the title of the Act and the 1914 legislative history demonstrate that the Clayton Act was remedial legislation designed to cure perceived deficiencies in the Sherman Act. It would indeed be illogical to assume that Congress intended the Clayton Act to be more limited in scope than the Sherman Act which it was designed to supplement.

In light of the remedial purpose of the Clayton Act, a narrow construction such as that sought by appellee would frustrate the statute's stated goal and should not be adopted in the absence of a clear expression of legislative intent. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 542–544; *Shapiro* v. *United States*, 335 U.S. 1, 31.

The legislative history of Section 7 of the Clayton Act, the selection of the same language concerning the commerce requirement as was used in the Sherman Act which adopted the literal words of the Constitution, and the construction accorded the statutory terms in contemporaneous judicial decisions confirm that the 1914 Act reaches all firms engaged in commercial activities that concern more states than one; that is, local activities that affect interstate commerce as well as activities in the "flow" of interstate commerce.

Appellee does not challenge our analysis of the 1914 legislative history of the Act; indeed, appellee does not refer to that material. Rather, appellee relies on

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the scope of its commerce requirement is illogical and finds no support in the legislative history or the case-law. And appellee's invocation of Section 3 of the Clayton Act as support for its position is misplaced since that section has been applied to local transactions. See *Standard Oil of California* v. *United States*, 337 U.S. 293.

subsequent administrative and legislative activities that it contends reveal the intentions of the original draftsmen of the Act. The evidence relied upon by appellee is, however, not probative. "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any significance.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (quoting *Rainwater* v. *United States*, 356 U.S. 590, 593). See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–349.

Moreover, the material appellee cites does not indicate the view of a subsequent Congress regarding the scope of the Clayton Act, because appellee refers only to the introduction of bills that contained "affecting commerce" language. Such bills do not even demonstrate that their sponsors believed the Act was limited in scope, because it is equally likely that the bills were proposed to remove any possible doubt on the question and thereby avoid the necessity for litigation. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47. In any event, "Congress neither enacted or rejected these proposals; it simply did not act on them." *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 609. Such congressional inaction does not constitute affirmative evidence of lack of authority. *Id.* at 610.[2]

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[2] The "rejection" evidence cited in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.* (No. 73–1012, decided December 17, 1974), slip op. at 13, concerning the commerce requirement of the Robinson-Patman Act is of wholly a different character. There, language which would have given the act a broader scope was deleted by a Conference Committee of the Congress which enacted the Robinson-Patman Act.

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2. Appellee's assertion that in 1950 Congress "re-enacted the same limited jurisdictional language it placed in the statute in 1914" (Appellee's brief, p. 32) and "considered and consciously rejected broadening the commerce language in Section 7" (*Ibid.*)[3] is incorrect. As shown in our main brief (pp. 17–18), the 1950 legislative history is consistent with our submission concerning the scope of the Act.

In particular, the House Report (H.R. Rep. No. 1191, 81st Cong., 1st Sess.) confirms that the 81st Congress did not view the acquisition of local enterprises with indifference. That report includes a chart of Borden Co. acquisitions, most of which obviously involved small local companies, as an illustration of the kind of acquisition program with which Congress was concerned (see Appendix A to this brief).

3. Appellee's reliance upon what it contends is a past pattern of enforcement is misplaced. Such an enforcement pattern would not be dispositive even if it existed. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 590. But more importantly, the Justice Department has never taken the position that Section 7 is restricted to the

[3] The 1950 amendments did not deal with the commerce requirement of the Act. It is significant, however, that the "any section of the country" language that was adopted as part of the test of competitive effect was substituted for the originally proposed "any community" language because of fears that the Act would be used against purely local transactions. (See our main brief, p. 34). These fears would have been unwarranted if the Act applied only to firms engaged in the "flow" of commerce.

acquisition of companies engaged in the "flow of commerce." Past actions merely reflect the absence of economically significant acquisitions prior to the recent trend toward concentration in some segments of the service sector.[4]

This case does not, as appellee contends (Appellee's brief 37–38), involve a radical departure from the previous enforcement pattern of Section 7 of the Clayton Act. In the past, the United States has challenged acquisitions of essentially local businesses that affected interstate commerce. See *e.g.*, *United States* v. *Von's Grocery Co.*, 384 U.S. 270; *United States* v. *County National Bank of Bennington*, 339 F. Supp. 85 (D. Vt.).

4. Appellee also contends that the Benton Companies' activities did not have any effect on the flow of interstate commerce (Appellee's brief pp. 8–14). As discussed in our main brief (pp. 36–44) however, the record shows the contrary. We add only the following:

a. Appellee suggests that janitorial and building maintenance services do not make any important contribution to the operations of the former Benton clients. But the affidavits of former Benton clients

[4] The sole evidence of restrictive administrative interpretation cited by the appellee is *In re Foremost Dairies*, 60 FTC 944, where the Federal Trade Commission held that one particular acquired company was not "engaged in commerce." The decision does not discuss the commerce issue in detail, but even if the *Foremost* opinion assumes that interstate sales or direct interstate purchases are required to place a dairy "in commerce", that isolated decision does not constitute a consistent administrative interpretation of long duration.

demonstrate that they do not share that view (App. 54–90).

b. Appellee also asserts that the statement that contracts were negotiated with out-of-state owners through the use of interstate communications facilities "is contrary to fact" (Appellee's brief 12). That assertion is inconsistent with appellee's motion to affirm (p. 18), which stated that Benton sent 203 interstate mail items "only a few of which related to the solicitation or negotiation of contracts." In any event, appellee does not dispute that persons who resided outside California had substantial contracts with Benton.

The Benton companies were engaged in activities which affect more states than one and their disappearance through merger and acquisition is subject to the Clayton Act.

The judgment of the district court should be reversed and the case remanded for trial.

Respectfully submitted.

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APRIL 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

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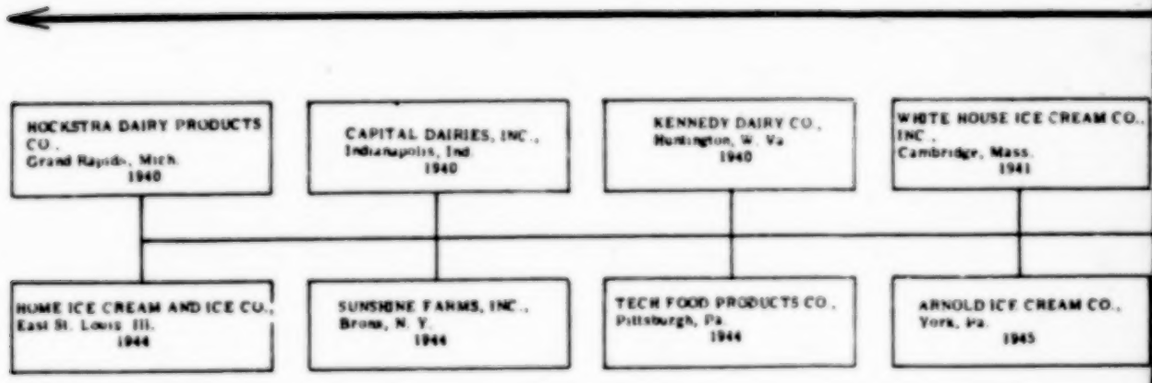
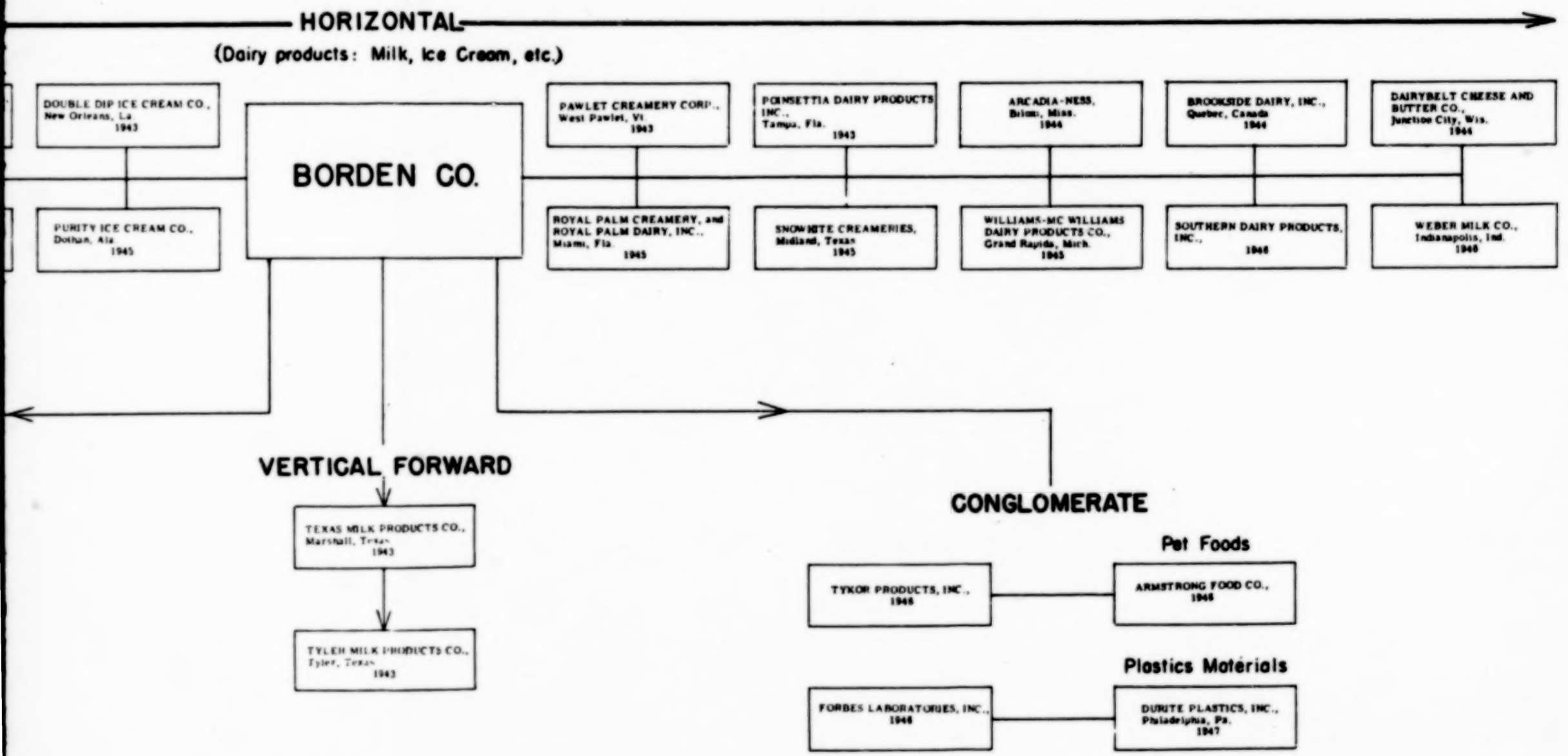

HORIZONTAL AND
HOCKSTRA DAIRY PRODUCTS CO., Grand Rapids, Mich. 1940
CAPITAL DAIRIES, INC., Indianapolis, Ind. 1940
KENNEDY DAIRY CO., Huntington, W. Va. 1940
WHITE HOUSE ICE CREAM CO., INC., Cambridge, Mass. 1941
HUME ICE CREAM AND ICE CO., East St. Louis Ill. 1944
SUNSHINE FARMS, INC., Bronx, N. Y. 1944
TECH FOOD PRODUCTS CO., Pittsburgh, Pa. 1944
ARNOLD ICE CREAM CO., York, Pa. 1945
CONGLOMERATE
Sardines & Fish Oil
FARALLONE PACKING CO., San Francisco, Calif. 1941
Soy Bean Products
SOY BEAN PROCESSING CO., Waterloo, Iowa 1943
Pharmaceuticals
W. F. STRAUB & CO., Chicago, Ill. 1945
SOY BEAN PRODUCTS CO., Chicago, Ill. 1945
SOURCE BASED UPON ACTIONS REPORTED BY MOODY'S INVESTORS SERVICE AND STAN

CHART I

OTHER ACQUISITIONS OF THE BORDEN CO., 1940-47


HORIZONTAL
(Dairy products: Milk, Ice Cream, etc.)
DOUBLE DIP ICE CREAM CO., New Orleans, La. 1943
PURITY ICE CREAM CO., Dothan, Ala. 1945
BORDEN CO.
PAWLET CREAMERY CORP., West Pawlet, Vt. 1943
ROYAL PALM CREAMERY, and ROYAL PALM DAIRY, INC., Miami, Fla. 1945
POINSETTIA DAIRY PRODUCTS INC., Tampa, Fla. 1943
SNOWHITE CREAMERIES, Midland, Texas 1945
ARCADIA-NESS, Biloxi, Miss. 1944
WILLIAMS-MC WILLIAMS DAIRY PRODUCTS CO., Grand Rapids, Mich. 1945
BROOKSIDE DAIRY, INC., Quebec, Canada 1944
SOUTHERN DAIRY PRODUCTS, INC., 1946
DAIRYBELT CHEESE AND BUTTER CO., Junction City, Wis. 1944
WEBER MILK CO., Indianapolis, Ind. 1946
VERTICAL FORWARD
TEXAS MILK PRODUCTS CO., Marshall, Texas 1943
TYLER MILK PRODUCTS CO., Tyler, Texas 1943
CONGLOMERATE
Pet Foods
TYKOR PRODUCTS, INC., 1946
ARMSTRONG FOOD CO., 1946
Plastics Materials
FORBES LABORATORIES, INC., 1946
DURITE PLASTICS, INC., Philadelphia, Pa. 1947

ARD AND POOR'S CORPORATION